Read : Application dt.26.3.2008 by M/s.Godrej SCA Hygiene Ltd. Holder of TIN 27480611172V.

Heard : Shri Prem Chhatpar, Chartered Accountant.

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PROCEEDINGS

(Under Section-56(1)(e) of Maharashtra Value Added Tax Act, 2002)

DDQ-11-2008/Adm-3/10/B-1 Mumbai,dt. 07.12.10

An application is received from the applicant having address as Pirojsha Nagar, Off Eastern Express Highway, Vikhroli (E), Mumbai- 400 079 requesting determination on 'baby diapers' which are known as 'Diapers' in North America and 'Nappies' in Britain.

02. FACTS OF THE CASE

It is informed that at present, the products are imported from outside India and when imported are classified under the Tariff Entry No.4818 40 10. The purpose of the diaper is to contain mess and keep the wearer (babies or adults suffering from incontinence (bed wetting) dry and comfortable for several hours at a time. When diapers become full and can no longer hold any more waste, they require changing.

The applicant's products, diapers, are of the disposable variety with the outer lining, closest to the skin being made out of non-woven fabric which gives a cloth-like feel and the inner absorbent material, which enables the product to perform the intended function, being layers of cellulose wadding. While the top layer closest to the skin transfers urine quickly to the layers underneath, the distribution layer receives the urine flow and transfers it on to the cellulose wadding, which are intended to perform the primary function of absorbing the urine/waste. The absorbent core structure is the key component which provides the reason / rationale for the use of the diaper. However, no chemicals are used for facilitating the absorption process.

The applicant informed that he has come across Trade Circular No.35T of 2005 dt.9.11.2005 which clarified the scope of entry-70 of schedule-C to the Maharashtra Value Added Tax Act, 2002, which reads as under:

> Paper, newsprint, paper board and waste paper, computer paper stationery of all types, carbon paper, ammonia paper.

The applicable rate of tax for items falling under this entry is 4%. The Trade circular proceeded to list out various items of paper in terms of the Central Excise Tariff, 1985. The list included, *inter alia*, 4818:

4818	Toilet paper and similar paper, cellulose wadding or webs of cellulose fibres, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm. or cut to size or shape; handkerchiefs, cleansing tissues, towels, table cloth, serviettes, **napkins for babies,** tampons, bed sheets and similar household sanitary or hospital articles.

The Central Excise Tariff Entry is reproduced hereunder:

4818	Toilet paper and similar paper, cellulose wadding or webs of cellulose fibres, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 CM or cut to size or shape; handkerchiefs, cleansing tissues, napkins for babies, tampons, bed sheets and similar household, sanitary or hospital articles, articles of apparel and clothing accessories, of paper pulp, paper,

	cellulose wadding or webs of cellulose fibres.
4818 10 00	- Toilet paper
4818 20 00	- Handkerchiefs, cleaning or facial tissues and towel
4818 30 00	- Table cloths and serviettes
4818 40	- Sanitary towels and tampons, napkins and napkin liners for babies and similar sanitary articles:
4818 40 10	--- Baby and clinical diapers
4818 40 90	--- Other
4818 50 00	- Articles of apparel and clothing accessories
4818 90 00	- Other

It is informed that on a comparison of the Central Excise Tariff and the description in the Trade Circular, it will be seen that the portion "Articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibres" has been left out. In other words, care has been taken to exclude articles of apparel and clothing accessories covered by 48185000 and 48189000. However, baby and clinical diapers falling under sub-heading 48184010 under the main heading 4818 40 "Sanitary towels and tampons, napkins and napkin liners for babies and similar sanitary articles" are covered under schedule entry C-70 as per Trade Circular.

By a rejoinder submitted during the course of the hearing, the applicant informed that,-

"the applicant is also selling,-

i. absorbent paper based diapers under the brand name, "Snuggy"
ii. female sanitary napkins under the brand name, "Libresse"
iii. Adult incontinence pads under the brand name, 'Tena'

all of which fall under the CET 48184010.

It is submitted in the rejoinder that an application for DDQ in respect of absorbent paper based diapers under the brand name 'Libero' was made as a test case but the ratio would be equally applicable to the other products listed above. Hence, it is prayed that the scope of the application for DDQ may be widened to cover products listed at (i) to (iii) above. Copies of the sales invoices and bills of entry for home consumption are enclosed.

It is stated that during the period, 1.7.2007 to 31.12.2007, the company had been classifying these products under the residuary schedule entry E-1. In December 2007, the company had come across Trade Circular 35-T of 2005 dt.9.11.2005 which, *inter alia*, had clarified that napkins for babies, tampons, sanitary napkins, etc. falling under CET 4818 were classifiable under schedule entry C-70 attracting 4% VAT. The company had also taken note of the widespread view in the industry that these products were classifiable under schedule entry C-70 on the basis of the Trade Circular No.35-T of 2005 dt.9.11.2005. Accordingly, the company had decided to charge 4% VAT on sales of these products in line with the industry practice w.e.f. 1.1.2008.

It is further stated that the aforesaid Trade Circular 35-T of 2005 dt.9.11.2005 has since been withdrawn by issuing a fresh Trade Circular 7-T of 2010, which gives a curtailed list of Central Excise Tariff entries that enjoy 4% VAT and does not refer to CET 4818. The Trade Circular 7-T of 2010 takes effect from the date of its issuance i.e. 3.2.2010. The applicant has informed that they have deduced that the products stands re-classified under residuary entry E-1 w.e.f. 3.2.2010 and the tax liability of dealers dealing in absorbent paper based diapers (napkins for babies) and feminine sanitary napkins stands protected during the intervening period, 9.11.2005 to 2.2.2010 (in the present case from 1.1.2008 to 2.2.2010)

It is informed that in view of the above concession, the company accepts the revised view taken that the products falling under CET 4818 that were excluded in Trade Circular 7-T of 2010 are liable to be re-classified under schedule E-1 attracting 12.5% VAT w.e.f. 3.2.2010 and has been discharging its sales tax liability at the rate of 12.5%.

Accordingly, it is stated that if their interpretation is approved, the application for DDQ may be decided against them and additional sales tax liability on sales of diapers sold under the brand names 'Snuggies', 'Libero', 'Tena' and sanitary napkins sold under the brand name 'Libresse' be protected during the intervening period, i.e from 1.1.2008 to 2.2.2010 as per Trade Circular 7-T of 2010 dt.3.2.2010."

03. HEARING

Shri Prem Chhatpar, Chartered Accountant attended on behalf of the applicant. The product of the applicant is absorbent paper based diapers (napkins for babies) sold under the brand name 'Libero' and 'Snuggies'. It is covered by Central Excise heading 4818. Based on this classification and in view of circular No.35-T of 2005 dt.9.11.2005, the applicant charged tax @ 4% w.e.f. 1.1.2008.The applicant started operations only in July 2007 and was charging tax @ 12.5% from July-2007 to January-2008 as the applicant came to know about the circular later. The company charged tax @ 4% upto 2.2.2010 upto the time the new circular No.7-T of 2010 dt.3.2.2010 for 'paper' was issued. Thereafter, in light of the new circular, they started charging tax @ 12.5%. The applicant accepts the revised position but the tax liability in the intervening period should be protected in view of the Trade Circular dt.3.2.2010.

It was brought to the notice of the applicants' representative that the invoice is only of 'Libero' diapers. He informed that the applicant sells both products – Libero and Snuggies. He also desires determination on rate of tax on 'sanitary napkins'. He was told to produce sale invoices of all the products – Libero/Napkins/Snuggies. He also promised to produce the written submissions regarding all the products.

04. OBSERVATIONS:

In the original application dt.26.3.2008 the applicant had only requested determination on paper napkins for babies, sold under the brand name 'Libero'. However, during the course of hearing and also in the written submission dt.2.11.2010, the applicant has requested determination on two more products i.e. sanitary napkins sold under the brand name 'Libresse' and 'adult incontinence pads' sold under the brand name 'Tena'. Therefore, I will have to decide the rate of tax on all the above products.

The applicant is well aware of the fact that a Trade Circular No.35-T of 2005 dt.9.11.2005 was issued which clarified that napkins for babies, tampons, falling under Central Excise Tariff (CET) heading 4818 are covered under schedule entry C-70 and attract tax @ 4%. In the circular the scope of schedule entry C-70 was explained. The schedule entry is reproduced below,-

Schedule entry C-70 w.e.f. 1.4.2005

Paper, newsprint, paper board and waste paper, computer paper stationery of all types, carbon paper, ammonia paper.

In the circular while clarifying the scope of the entry in terms of the description given under the relevant CET headings, heading 4818 was also included. The heading is reproduced below,-

4818	Toilet paper and similar paper, cellulose wadding or webs of cellulose fibres, of a kind used for household or sanitary purposes, in rolls of a width not exceeding 36 cm or cut to size or shape; handkerchiefs, cleansing tissues, napkins for babies, tampons, bed sheets and similar household, sanitary or hospital articles, articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibres.
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4818 40 10	--- Baby and clinical diapers
4818 40 90	--- Other
4818 50 00	- Articles of apparel and clothing accessories
4818 90 00	- Other

Thus, the explanation given in the circular implied that baby napkins and sanitary napkins are covered by schedule entry C-70. In the case of Patsan Hygiene Industries Pvt. Ltd. vs Collector of C. Ex. Decided on 18/12/1990,the CESAT held that 'sanitary napkins' are covered by excise heading 4818 of the CET Act. As for 'adult diapers' it is covered by the expression 'clinical diapers' given against heading 4818 40 10. Also, the bills of entry show that all the products are cleared under custom heading 4818. Therefore, as per the clarification given in the Circular, 'baby diapers', 'sanitary napkins' and 'adult diapers' all fall under the scope of excise heading 4818 and therefore, are covered by schedule entry C-70.

However, the circular was withdrawn and superseded by a fresh circular No.7-T of 2010 dt.3.2.2010. In the intervening period the schedule entry C-70 was also amended w.e.f. 1.2.2006 and the said entry is reproduced below,-

Schedule entry C-70 w.e.f. 1.2.2006

C-70 (a) Paper, newsprint, paper board and waste paper,

(b)All types of paper stationery for computer, carbon paper, ammonia paper.

The circular 7-T of 2010 also describes the scope of the entry C-70 in terms of description given under certain CET headings. The circular, however, does not include heading 4818 while explaining the purview of schedule entry C-70. This implies that 'baby napkins', 'sanitary napkins' and 'adult diapers' are no longer covered by schedule entry C-70. The circular also takes effect from the date of issuance. Therefore, 'baby diapers' and 'sanitary napkins' and 'adult diapers' will not be covered by schedule entry C-70 w.e.f. 3.2.2010.

The applicant has stated in his written submission that they accept the revised view taken in circular No.7-T of 2010 that the products falling under CET heading 4818 are not covered by schedule entry C-70. They have been accordingly charging sales tax @ 12.5% w.e.f. 3.2.2010. In view of the above, I do not feel necessary to deal with the issue as the applicant accepts the view taken in the circular.

The applicant has prayed that his liability be protected during the period 1.1.2008 to 2.2.2010. He has informed in his written submission that during the period 1.7.2007 to 31.12.2007 the company was classifying these products under the residuary entry E-1. It charged tax @ 4% from 1.1.2008 to 2.2.2010. It is clarified in the Circular that the Circular 7-T of 2010 is effective only from 3.2.2010. Therefore, it logically follows that all the products of the applicant are taxable @ 4% prior to 3.2.2010. `

05. In view of the above, the following order is passed:

ORDER

(Under Section-56(1)(e) of Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2008/Adm-3/10/B-1 Mumbai, dt.07.12.10

The sale of baby diaper 'Libero' sold through invoice No.176 dt.22.2.2008, sale of 'Libresse' sold through invoice No.213 dt.17.3.2008 and sale of 'Tena' – adult incontinence pads sold through invoice No.190 dt.3.3.2008 is taxable @ 4% under schedule entry C-70 before 3.2.2010 and taxable @ 12.5% under schedule entry E-1 from 3.2.2010 onwards.

(SANJAY BHATIA)
Commissioner of Sales Tax,
Maharashtra State, Mumbai.